

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 DANE R. GILLETTE
Chief Assistant Attorney General
3 GERALD A. ENGLER
Senior Assistant Attorney General
4 PEGGY S. RUFFRA
Supervising Deputy Attorney General
5 JEFFREY M. LAURENCE
Deputy Attorney General
6 State Bar No. 183595
455 Golden Gate Avenue, Suite 11000
7 San Francisco, CA 94102-3664
Telephone: (415) 703-5897
8 Fax: (415) 703-1234
Email: Jeff.Laurence@doj.ca.gov
9 Attorneys for Respondent

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 **DAMEON RAY FRANKLIN,**

14 Petitioner,

15 **v.**

16 **ANTHONY HEDGPETH, Warden,**

17 Respondent.
18

C 08-3811 WHA (PR)

**MOTION TO DISMISS FOR
UNTIMELINESS**

19 Respondent hereby moves to dismiss the petition for writ of habeas corpus for failure to
20 comply with the statute of limitations established by the Antiterrorism and Effective Death Penalty
21 Act (AEDPA) in 28 U.S.C. § 2244(d).

22 A motion to dismiss in lieu of an answer on the merits is proper where the petition is
23 procedurally defective. *See White v. Lewis*, 874 F.2d 599, 602 (9th Cir. 1989); *O'Bremski v. Maass*,
24 915 F.2d 418, 420 (9th Cir. 1990); Rules Governing 28 U.S.C. § 2254 Cases, Rule 4, and Advisory
25 Committee Notes; *see also Jablon v. Dean Whitter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) (motion
26 to dismiss proper if time bar is clear from face of complaint).

27 We have not noticed a hearing date because petitioner is an incarcerated state prisoner who
28 is representing himself in this action.

STATEMENT OF THE CASE

On September 9, 2007, the trial court imposed judgment on petitioner following his conviction on two counts of forcible rape committed in concert (Cal. Penal Code §§ 261(a)(2) & 261.1), and two counts of forcible oral copulation in concert (Cal. Penal Code § 288a(d)), sentencing petitioner to 18 years in state prison. Pet. Exh. 5 at 1-2.

On June 6, 2003, the California Court of Appeal affirmed petitioner's conviction in an unpublished opinion. Resp. Exh. 1. Petitioner did not file a petition for review. Resp. Exh. 2 (reflecting that petitioner did not file a petition for review, and that only petitioner's two codefendants filed petitions for review); *see also* Pet. at 14-26 (Petitioner's Petition for Writ of Habeas Corpus filed in the California Supreme Court, which is attached to petitioner's instant petition as an unnumbered exhibit, immediately before the numbered exhibits, acknowledges that he did not file a petition for review from the denial of his appeal); Pet. Exh. 1 at 5 (Petitioner's Petition for Writ of Habeas Corpus filed in the Alameda County Superior Court likewise acknowledges that petitioner did not file a petition for review from the denial of his appeal).^{1/}

On March 7, 2007, petitioner filed a state habeas petition in the Alameda County Superior Court, which the court denied on April 30, 2007. Pet. Exhs. 1 & 2. On October 1, 2007, petitioner filed a state habeas petition in the California Supreme Court, which the court denied on March 13, 2008. Pet. at 14-26; Resp. Exh. 3. That petition was denied on June 30, 2004. Resp. Exh. 3. Petitioner filed his federal habeas petition on August 11, 2008. This Court issued an order to show cause on August 18, 2008.

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1. On page four of his federal petition, petitioner asserts that he filed a petition for review before the California Supreme Court in 2004, but does not give a case number or a result of the decision. Petitioner offers no evidence to support this assertion.

ARGUMENT**THE PETITION IS UNTIMELY**

Petitioner's case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which applies to all cases filed after its effective date of April 24, 1996. *Lindh v. Murphy*, 521 U.S. 320 (1997). Whereas prior law imposed few meaningful time constraints on the filing of federal habeas petitions, the AEDPA imposes a one-year statute of limitations. 28 U.S.C. § 2244(d). The year commences on the latest of (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action; (C) the date on which a constitutional right is newly recognized and made retroactively applicable; or (D) the date on which the factual predicate of the claim presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1).

Judged by these principles, and in the absence of any other factual assertion by petitioner, the year in this case commenced on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Petitioner's state judgment became final on July 15, 2003, when the time for filing a petition for review elapsed, 10 days after the date the court of appeal opinion became final, which was 30 days after the court of appeal issued its opinion. Cal. R. Ct. 8.264 & 8.500(e)(1).

The statute of limitations under the AEDPA expired one year later on July 15, 2004. Petitioner waited nearly three more years before filing his first state habeas petition in the Alameda Superior Court. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 ("[S]ection 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed."). Consequently, the instant petition must be dismissed as having been filed after the expiration of the statute of limitations.

CONCLUSION

Respondent respectfully requests that the petition for writ of habeas corpus be dismissed.

Dated: August 26, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

PEGGY S. RUFFRA
Supervising Deputy Attorney General

/s/ Jeffrey M. Laurence

JEFFREY M. LAURENCE
Deputy Attorney General
Attorneys for Respondent

JML:jw
20136182.wpd

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Dameon Ray Franklin v. Anthony Hedgpeth, Warden**

No.: **C 08-3811 WHA (PR)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 26, 2008, I served the attached

MOTION TO DISMISS FOR UNTIMELINESS

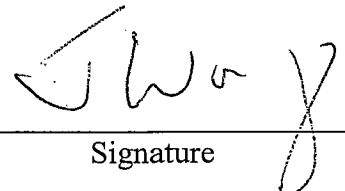
by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

**Dameon Ray Franklin
T-29665
Kern Valley State Prison
C4-107
PO Box 5103
Delano, CA 93216**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 26, 2008, at San Francisco, California.

J. Wong

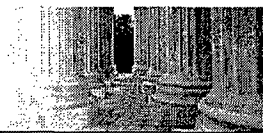
Declarant



Signature

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The People v. Franklin et al.
 Division 3
 Case Number A096254

Date	Description	Notes
09/20/2001	Notice of appeal lodged/received (criminal).	Dameon Franklin; 9/7/01.(C136007B)
09/25/2001	Notice of appeal lodged/received (criminal).	Stacy Lytle; 9/18/01.(C136007A)
10/09/2001	Notice to reporter to prepare transcript.	Reminder notices sent to CSR's dated 10/4/01.
10/31/2001	Telephone conversation with:	Carol @ superior court, the rpters were notified 9/13/01. Txs due 11/3/01.
11/27/2001	Telephone conversation with:	Valerie @ superior court, she will get back w/me on the status.
11/28/2001	Telephone conversation with:	Carol @ superior court, the record was sent to DCA 11/10/01 but filed under the co-defts appeal #A096216. She will send a CCC for the record to be applied for both appeals.
12/04/2001	Counsel appointment order filed.	aty Jones for d/a Franklin (Dameon) assisted
12/19/2001	Order filed.	transferring case from Div. 1 to Div. 3
01/11/2002	Certificate of county clerk filed.	One record was prepared for dfndt Stacy Lytle C136007A (A096254), Dfdnt Dameon Franklin C136007B (A096254) and dfndt Shuante Gullede C136665 (A096216). All 3 dfndt where tried together.
01/11/2002	Record on appeal filed.	c-2 - r-12 (Record filed in A096216)
02/21/2002	32.1(b) letter received from:	atty jones. (see 35e request)

02/22/2002	Note:	fdap re appointment for stacey
03/04/2002	Filed augmented record pursuant to rule 32.1(b)	(see request)
03/08/2002	Default sent to court appointed counsel.	atty Jones
03/13/2002	Counsel appointment order filed.	atty steinberg for Lytle indep (40)
03/21/2002	Exhibits lodged.	court exhibits 2-5 (copies)
04/03/2002	Filed letter from:	atty steinberg joining in the 35e requests filed on behalf of counsel for co-aplt. franklin
04/08/2002	Telephone conversation with:	cnsl jones he states hasn't received default notice will submit ext asap
04/10/2002	Requested - extension of time.	Attorney: Jones, Rodney Party: Franklin, Dameon
04/12/2002	Granted - extension of time.	Attorney: Jones, Rodney Party: Franklin, Dameon
04/23/2002	Default sent to court appointed counsel.	atty steinberg for Stacy Lytle
05/09/2002	Default sent to court appointed counsel.	atty jones
05/13/2002	Motion filed.	consolidate a096216 and a096254
05/23/2002	Appellant's opening brief.	Attorney: Steinberg, John Party: Lytle, Stacy Attorney: First District Appellate Project Party: Lytle, Stacy
06/05/2002	Appellant's opening brief.	Attorney: Jones, Rodney Party: Franklin, Dameon
06/07/2002	Application filed to:	file supplemental aob(aob attached)
06/11/2002	To court.	mtn consolidate a096216 and a096254
06/21/2002	Order filed.	Respondent's unopposed motion to consolidate the appeals in case numbers A096216 and A096254 is granted for purposes of further briefing, oral argument (if any), and decision. Respondent shall file its brief in the consolidated appeal on or before Friday, July 19, 2002. All counsel are directed to list both case numbers on all future pleadings.
07/22/2002	Order filed.	aplt's unopposed mtn to file a supplemental opening brief granted.

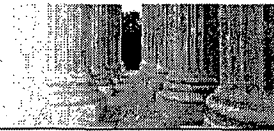
		supplemental brief received 06/07/02 ordered filed as part of the record on appeal. rbf due on or before 08/16/02. response to aplt's supplemental shall be included in rbf.
07/22/2002	Supplemental brief filed by:	Attorney: Steinberg, John Party: Lytle, Stacy
07/25/2002	Requested - extension of time.	
07/25/2002	Granted - extension of time.	Attorney: Office of Attorney General Party: The People
08/22/2002	Respondent notified pursuant to rule 17(a)(2) or 37(b).	sent in error ext filed 08/20/02
08/20/2002	Requested - extension of time.	Attorney: Office of Attorney General Party: The People
08/27/2002	Granted - extension of time.	Attorney: Office of Attorney General Party: The People
09/23/2002	Respondent notified pursuant to rule 17(a)(2) or 37(b).	
10/25/2002	Requested - extension of time.	Attorney: Office of Attorney General Party: The People recd 10/23/02
11/01/2002	Granted - extension of time.	Attorney: Office of Attorney General Party: The People
12/02/2002	Requested - extension of time.	Attorney: Office of Attorney General Party: The People
12/06/2002	Granted - extension of time.	Attorney: Office of Attorney General Party: The People
12/06/2002	Note:	NO FURTHER EXT CONTEMPLATED FOR RBF
12/11/2002	Respondent's brief.	Attorney: Office of Attorney General Party: The People
12/31/2002	Telephone conversation with:	Rodney Jones, cnsl for aplt Dameon: will file request to file late arb (with arb attached) on Monday, 1/6/03.

01/03/2003	Appellant's reply brief.	Attorney: Steinberg, John Party: Lytle, Stacy certified mail 12/30/02
01/08/2003	ARB not filed (time elapsed or notice no brief).	from atty rodney jones case cfb today
01/08/2003	Case fully briefed.	
01/10/2003	Appellant's reply brief.	Attorney: Jones, Rodney Party: Franklin, Dameon permission to file granted
02/05/2003	Oral argument waiver notice sent.	
02/05/2003	Case on conference list.	03/02
02/06/2003	To court.	Case for Review.
02/19/2003	Argument waived by: (no response - 10 day notice)	
02/26/2003	Request for oral argument filed by:	atty Jones for Franklin
04/18/2003	Calendar notice sent. Calendar date:	5/13/03; 9 a.m.
05/06/2003	Supplemental brief filed by:	Attorney: Office of Attorney General Party: The People
05/13/2003	Cause argued and submitted.	
05/22/2003	Order filed.	request for reconsideration of ruling granting aplts Gullledge's supplemental motion to augment record is denied.
06/02/2003	Opinion filed.	
06/13/2003	Note:	copy of opinion remail to atty jones and Steinberg
07/01/2003	Record transmitted to Supreme Court.	Case for review.
07/03/2003	Petition for review filed in Supreme Court.	
09/11/2003	Remittitur issued.	
09/11/2003	Case complete.	
10/08/2003	Record returned from Supreme Court.	On Conference list for 10/01/03
09/24/2004	Shipped to state retention center, box # / list #:	L184
10/01/2007	Received copy of:	Petition for Writ of Habeas Corpus filed in Supreme Court

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PEOPLE v. GULLEDGE
Case Number S117232



Date	Description	Notes
06/30/2003	Received premature petition for review	from counsel for appellant (Stacy Lytle).
07/03/2003	Case start: Petition for review filed	by counsel for appellant (Stacy Lytle).
07/03/2003	2nd petition for review filed	by counsel for appellant (Shawnte Gulledge).
07/03/2003	Record requested	A096216 & A096254
07/07/2003	Received Court of Appeal record	A096216-file jacket/briefs/two sealed envelopes/envelope of exhibits/one box
07/08/2003	Received Court of Appeal record	A096254-file jacket/briefs/envelope of exhibits
08/27/2003	Petitions for review denied	Werdegard, J., was absent and did not participate.

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FRANKLIN (DAMEON RAY) ON H.C.

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Date	Description	Notes
10/01/2007	Petition for writ of habeas corpus filed	by Dameon Ray Franklin, petitioner in Pro Per.
03/19/2008	Petition for writ of habeas corpus denied	

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